

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No. 77-935

HELENE CURTIS INDUSTRIES, INC.,

Petitioner,

vs.

CHURCH & DWIGHT CO., INC., and
ALLIED CHEMICAL CORPORATION,

Respondents.

CHURCH & DWIGHT CO., INC.,

Respondent,

vs.

HELENE CURTIS INDUSTRIES, INC., and
N. W. AYER & SON, INCORPORATED,

Petitioners.

(Consolidated Causes)

**REPLY BRIEF OF PETITIONER IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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Respondent's brief underscores petitioner's submission that it is important to our competitive economy, and to the administration of the antitrust and trademark laws, that this Court issue a writ of certiorari and decide the issues presented by the present case.

I.

The Antitrust Defenses.

1. Respondent argues that this is "a straightforward trademark infringement suit" (Opp. Br. 2), but it is not. The issues presented are antitrust questions, relating to the interaction of antitrust laws and concepts and the trademark laws. As this Court recently stated, "Antitrust laws in general and the Sherman Act in particular, are the Magna Carta of free enterprise." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972).

2. Respondent asserts that "trademarks are not powerful anti-competitive devices." (Opp. Br. 11.) On the contrary, as this Court recognized in *Topco, supra*, 405 U. S. at 605-606,¹ trademarks, in this age of massive advertising and franchising, are prime competitive instruments, capable of being used anti-competitively. In the field of distribution, in fact, the exclusive rights that trademarks vest in their owners are the economic equivalent of patents in the manufacturing field. See Pet. 18-22; see also, Bahin, *Abuse of Trademarks*, 7 U. of Mich. J. L. Ref. 644, 645ff. (1974); Papandreou, *The Economic Effect of Trademarks*, 44 Cal. L. Rev. 503 (1956) ("the influential use of trademarks constitute[s] a source of monopoly power" (at 504), and "a device inhibiting entry and access" (at 508)).

3. Respondent contends that "allegations of antitrust violation are not a general trademark infringement defense" (Opp. Br. 13), and "even if Curtis were able to substantiate its extraordinary antitrust allegations, they would *not* constitute a complete defense in any sense of the word" (Opp. Br. 14, 15). (Emphasis in the original.) It asserts that Section 33(b)(7) of the Trademark Act merely defeats the "conclusiveness of the presumption that would otherwise attach to the registration," but that it "may not be used to preclude enforcement of a mark

1. Respondent does not discuss *Topco* although it is relied upon in our Petition at p. 19.

independently shown to be valid and infringed." (Opp. Br. 14.) Section 33(b)(7), which has never been construed by this Court, provides that the registration of a trademark is not conclusive evidence of the registrant's exclusive right to use it where "the mark has been or is being used to violate the antitrust laws of the United States." (Pet. 4, 5.) In our view, the effect of this provision is that the registered trademark, in the described circumstances, is unenforceable.

Further, it is clear that, regardless of Section 33(b)(7), under established principles of law and specific decisions of this Court, proof of the use of a trademark in violation of the antitrust laws is a complete defense to an infringement action. Pet. 16ff.; *Timken Roller Bearing Co. v. United States*, 341 U. S. 593, 599 (1951); *Ford Motor Co. v. United States*, 405 U. S. 562, 576 (1972); *United States v. Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944); see also, Section 33(a) of Trademark Act set forth in our Petition, p. 4.

4. Some of the decisions cited by respondent—all of them being District Court opinions—support respondent's reading of Section 33(b)(7), but none of them refutes the proposition that, under established principles of law, the use of a trademark in violation of the antitrust laws is a complete defense to a charge of trademark infringement. The basic difficulty, however, which urgently requires the intervention of this Court, is that many lower courts—like the District Court and the Court of Appeals in the present case—hold that the applicability of antitrust is very narrowly limited. Or, to use the words of the Court of Appeals in the present case, "antitrust defenses" are of "limited applicability and viability . . . to trademark infringement claims." (560 F. 2d at 1337, Pet. App. 19.)

5. The present case presents the clearest possible use of a trademark in violation of the antitrust laws. In order to protect and extend the 100% monopoly of baking soda and baking soda products which respondent had established under its registered trademark Arm & Hammer, respondent, as it has done in

other situations, countered petitioner's introduction of a new baking soda product by quickly launching its own fighting product under its accepted, monopolistic trademark.² This is a clear violation of antitrust laws—the use of a governmentally conferred right to the exclusive use of a trademark “progressively to embrace each new opportunity as it opened,”³ to “foreclose competition”⁴ and extend the monopoly which was established under the registered trademark.

Despite these facts, and despite the fact that the antitrust misuse of the trademark was well pleaded and supported by evidence, the District Court made no findings and stated no conclusions whatever with respect to the impact of respondent's unlawful, anticompetitive actions upon respondent's claim to relief under its complaint. The District Court granted a preliminary injunction solely on the basis of findings that the trademark was valid and infringed and that petitioner's mark “Arm in Arm” had resulted in confusion with respondent's mark. Its sole comment relating to antitrust was that “None of the evidence . . . shows that confusion . . . has been caused . . . by

2. Respondent advertised and promoted its fighting product as Arm & Hammer “The Baking Soda Deodorant” (emphasis added) to capitalize on 100% consumer acceptance of and familiarity with its mark as the *only* baking soda. An official of respondent testified on deposition as follows:

“Q. Why were you not content to simply call it ‘A Baking Soda Deodorant’?”

“A. ‘A’ suggests more than one, I guess. I don’t know.” (Abney Dep. 337, 338.)

3. *American Tobacco Co. v. United States*, 328 U. S. 781, 814 (1946). In *United States v. Griffith*, 334 U. S. 100 (1948), this Court held that it was a violation of Sections 1 and 2 of the Sherman Act where defendant theater operators had used their combined monopoly positions in certain towns (one market) to gain competitive advantages in other towns (a second market) where they had no monopoly. This is analogous to the use of Church's monopoly power in the baking soda market to gain a competitive advantage in the baking soda deodorant market.

4. *United States v. Griffith*, *supra* n. 3, 334 U. S. at 107.

any monopolization by [respondent] of . . . products containing Baking Soda.” (Pet. App. 122; Pet. 10.)⁵

Neither the District Court nor the Court of Appeals made a finding or stated a conclusion as to whether plaintiff/respondent is likely to prevail in establishing its antitrust defenses.⁶ Such a finding was essential to valid issuance of a preliminary injunction since (i) the use of a trademark in violation of antitrust laws is a complete defense to a trademark infringement suit, and since (ii) defendant/petitioner properly pleaded and submitted evidence in support of its antitrust defense (*see infra*). The basic reason for the absence of findings in the District Court on this subject is clear: The District Court did not regard antitrust violations as a viable defense to a trademark infringement action.

On appeal, the Court of Appeals similarly failed to discuss the substance of petitioner's antitrust allegations and evidence. It held that “the defense of antitrust misuse is largely ‘available to defeat the conclusive evidentiary force that would otherwise attach to a trademark certificate under the [Lanham] Act’” (560 F. 2d at 1336, Pet. App. 16), and it concluded that antitrust defenses were of “limited applicability and viability.” (560 F. 2d at 1337, Pet. App. 19.)

In arriving at this extremely limited conclusion as to the effect of antitrust violations upon trademark enforcement, the Court of Appeals' principal reliance was upon a portion of the opinion of Judge Mansfield, the District Judge, in *Carl Zeiss Stiftung*

5. This conclusion was addressed to defendant/petitioner's contention that the alleged “confusion” between defendant's product and plaintiff—which plaintiff sought to establish to show infringement—was the consequence of plaintiff's 100% monopoly which caused consumers to assume that any product with baking soda is an “Arm & Hammer” product. *E.g.*, the record contains the following statement from a memorandum in plaintiff's files: “Any manufacturer who advertises a deodorant with baking soda will be promoting ARM & HAMMER Deodorant. Because, when you say Baking Soda you automatically say Arm & Hammer.” (Emphasis in Original.) (Abney Dep. Ex. 8, Doc. P6494.)

6. See cases cited, 7 *Moore's Federal Practice*, ¶ 65.04[1] pp. 65-39; 11 *Wright and Miller, Federal Practice and Procedure: Civil*, § 2948, pp. 430-431.

v. *VEB Carl Zeiss Jena*, 298 F. Supp. 1309 (S. D. N. Y. 1969), *aff'd as modified* 433 F. 2d 686 (2 Cir. 1970), *cert. den.* 403 U. S. 905 (1971). Judge Mansfield's highly influential opinion, frequently relied upon by district courts, concluded that Section 33(b)(7) of the Trademark Act does not provide that the defense of trademark misuse in violation of the antitrust laws is a defense to enforcement of the mark. Judge Mansfield held that "the defense of antitrust misuse [is merely] to defeat the conclusive evidentiary force that would otherwise attach to a trademark certificate under the Act." (298 F. Supp. at 1311-12.) He proceeded to hold,⁷ however, that "[a]lthough the issue is not free from doubt, we believe that a court, in the exercise of its equity powers, may deny enforcement of a trademark on the part of one who has used that trademark in violation of the antitrust laws" where the "mark itself has been the basic and fundamental vehicle required and used to accomplish the violation." (298 F. Supp. at 1314, 1315.) He held that this possibility of "effective antitrust misuse of a trademark" is extremely "limited." (*Id.* at 1314.) Judge Mansfield found, after trial, that the defendant had failed to prove any violations and this finding was affirmed by the Court of Appeals, without discussion of the legal principles. (433 F. 2d at 706.) We do not disagree with the result reached on the evidence in *Zeiss*.

Our case is vitally different because both the allegations and the undisputed evidence submitted by petitioner demonstrate that in this case, respondent used its trademark and its 100% monopoly in the baking soda retail mark to eliminate petitioner's competition, in violation of the antitrust laws. We do, however, disagree with Judge Mansfield's construction of Section 33(b)(7) of the Act—and specifically with his erroneous conclusion that "the opportunity for effective antitrust misuse of a trademark" is "limited." (298 F. Supp. at 1314.) These are errors which have influenced all subsequent decisions in this field. See, *e.g.*, cases cited by the respondent: *Ceramco*,

7. Citing *Morton Salt Co. v. C. S. Suppiger Co.*, 314 U. S. 488 (1942); see Pet. 19 and 16 ff.

Inc. v. Lee Pharmaceuticals (Opp. Br. 13), "That plaintiffs have violated the antitrust laws is no answer to a claim of trademark infringement," 1976-1 Trade Cas. ¶ 60,815 (E. D. N. Y. 1976); *Seven-Up Co. v. No-Cal Corp.* (Opp. Br. 13), 183 U. S. P. Q. 165 (E. D. N. Y. 1974), "a claim of an attempt to create a monopoly by the use of a trademark is insufficient." But *cf. Phi Delta Theta Fraternity v. J. A. Buchroeder & Co.*, 251 F. Supp. 968 (W. D. Mo. 1966) and *Zenith Radio Corp. v. Marshall-Wells Co.*, 1959 Trade Cas. ¶ 69,343 (N. D. Ill. 1959).

6. Respondent argues, and lower courts have asserted, following Judge Mansfield's lead, that this Court's firm condemnation of antitrust misuse in patent cases is not applicable to trademarks, although this Court has similarly ruled in trademark cases and has made no such distinction. (Pet. 17.) They assert that the misuse of a trademark does not pose a serious threat to the economic health of a nation, whereas the contrary is true of patents. (See, *e.g.*, Opp. Br., footnote p. 11; *Carl Zeiss, supra*, 298 F. Supp. at 1314.) This proposition may have had some force in the remote past; it is a vast overstatement today when, as a result of television, mass media advertising, franchising, and other developments in the distributive process, trademarked brands have acquired powerful, quasi-monopolistic positions in the marketplace. *Ford Motor Co. v. United States*, 405 U. S. 562 (1972) (quoted Pet. 17), and *cf.* this Court's opinion in *Topco, supra*, 405 U. S. at 610; Pet. 19-22.

The present case dramatically demonstrates the power of trademarks in the marketplace, their potential for antitrust misuse, and their actual misuse for monopolistic purposes contrary to our law and basic public policy. Baking soda is a common household product, simply manufactured by an unpatented and uncomplicated process. For over 100 years, respondent has packaged and marketed baking soda under its mark "Arm & Hammer." Baking soda is present in over 90% of America's households. (Zwiren Dep. Ex. P0008.) Arm & Hammer

brand is the *only* baking soda sold at retail in this country; it has a 100% monopoly. Not content with this monopoly, respondent has consistently, without exception, fought any and every new consumer product containing baking soda which anyone has sought to introduce in the marketplace. Defendant/petitioner so alleged and, despite the fact that it was barred by a Rule 42(b) Order from discovery on the antitrust issues, petitioner introduced evidence as to two such instances in addition to its own experience, relating to a Colgate toothpaste containing baking soda and a Johnson & Johnson baking soda deodorant. (See Affirmative Defenses ¶¶ 119-121, 134-140, Pet. App. 79-83, 89-92; Pet. footnote 13, p. 21, p. 24.)

There is and can be no doubt that respondent in the precise, present situation, invoked against petitioner its universal policy of using its accepted trademark Arm & Hammer to preempt all competitive and potentially competitive consumer products containing baking soda and to prevent access and entry by competitors to any part of that market. The record contains a memorandum of respondent setting forth its policy, as follows:

"General Advertising Strategy

* * * *

"4. Pre-empt all competitive (or potentially competitive) deodorants which contain baking soda by capitalizing upon the Arm & Hammer name."

(Defendant's Church & Dwight Dep. Ex. 7, Doc. P9291; Pet. footnote 12, p. 21.)

This policy was translated into effective action against petitioner, as the record shows. (Pet. 5-7.) Shortly after petitioner introduced its personal deodorant "containing baking soda," respondent launched its "Arm & Hammer" personal deodorant, "The Baking Soda Deodorant." It had never before marketed a personal deodorant; its "product line [had] consisted of non-personal care products." (Pet. App. 146.) Although it had obtained the registration of "Arm & Hammer"

for a variety of products, respondent had never sought registration of the mark for a personal deodorant until *after* petitioner had filed an application for the mark which it used and had begun marketing its product.

7. The courts below did not discuss this indisputable evidence. They did not evaluate its impact; they did not discuss this clear, palpable use of a trademark which was the heart of respondent's 100% monopoly and "the prime and effective instrument to effectuate the antitrust activity"⁸ for the purpose of preempting petitioner's competitive (or potentially competitive) product—to "embrace each new opportunity as it opened."⁹ They did not discuss whether these facts, alleged in the pleadings and demonstrated by the evidence, constituted an antitrust defense which precluded judicial enforcement of the trademark. The District Court, as we have noted, ignored the entire subject of antitrust defenses, and the Court of Appeals, without elaboration, dismissed all of petitioner's allegations and evidence with the unexplained assertion that they are "remote and ill-founded." (560 F. 2d at 1331, Pet. App. 8.)

We respectfully submit that this was clearly erroneous—that it can be explained only by the courts' erroneous legal view of the interface and effect of antitrust upon trademark enforcement; and we suggest that this is an appropriate and a felicitous case for this Court to hand down badly-needed clarification of the law in a field of great importance to our legal and economic system.

II.

The Impact of the Rule 42(b) Order.

1. Respondent contests petitioner's presentation with respect to the Rule 42(b) Order on the grounds that "Curtis is in no position to claim prejudice as a result of the Rule 42(b) [Order]."

8. Quoted from Judge Mansfield's opinion in *Carl Zeiss, supra*, 298 F. Supp. at 1314.

9. *American Tobacco Co. v. United States*, 328 U. S. 782, 814 (1946).

That is because Curtis' antitrust allegations as a matter of law are not a general defense to a trademark infringement claim. . . ." (Opp. Br. 18.) As we have shown, this contention is insupportable.¹⁰

The issues which petitioner presents to this Court with respect to the Rule 42(b) Order are two-fold: First, was it error for the courts below to grant a preliminary injunction where, by reason of the Rule 42(b) Order, petitioner had been unnecessarily and erroneously denied an opportunity for discovery as to its defense that the trademark had been used in violation of the antitrust laws and established equitable principles? Second, was the issuance of the Rule 42(b) Order clearly erroneous: that is, was it error for the District Court to require that the plaintiff/respondent's claim for damages and other relief be tried *and decided* before the antitrust issues are heard, and independently of those issues, particularly where both the "trademark" and the antitrust claims are triable by jury?

We do not contest the fact that in some cases where antitrust as well as trademark or patent issues are presented, it is appropriate for the trial court under Rule 42(b) to sever the two types of issues and to defer discovery on the antitrust issues. This may not be done, however, when the effect is to deny to a party its substantive rights to make its well-pleaded defenses or to jury trial.

Typically, as the cases cited by respondent show, antitrust issues may be severed and deferred where the antitrust issues

10. Respondent also obscures two facts relating to the 42(b) Order. (1) Respondent refers to "dismissal . . . of Curtis' earlier petition for writ of certiorari to review the Second Circuit Court of Appeals'" order denying mandamus to compel Judge Burke (E. D. N. Y.) to vacate the 42(b) Order which was originally entered by him. (Opp. Br. 3.) The petition was dismissed on petitioner's motion because it was moot, the entire case having been transferred to the Northern District of Illinois. (See this Court's file, 1976 Term, No. 491, 429 U. S. 1011 (1976).) (2) The Court of Appeals did not rule on the 42(b) Order. While indicating its view that the District Court did not abuse its discretion in entering the order, it expressly noted that the District Court had not yet ruled on a motion to vacate the order and would have "a further opportunity to consider" its propriety. (App. 17.)

are solely counterclaims and not defenses, and where the patent/trademark issues or the entire case is triable to the court and not to a jury.¹¹

By contrast, in the present case, (i) the antitrust issues are alleged as defenses as well as counterclaims (see Pet. App. 50-97); (ii) the allegations and the evidence as to the antitrust defenses clearly constitute a bar to enforcement of the trademark; and (iii) jury trial was demanded, by plaintiff/respondent itself, on all issues—trademark validity and infringement as well as antitrust.

In these circumstances, the Rule 42(b) Order was clearly erroneous: The antitrust defenses and the issues of trademark validity and infringement presented by the complaint are neither independent, distinct nor separable; neither an interlocutory nor a final order granting relief under the complaint can be law-

11. All of the cases cited by respondent in which the Rule 42(b) Order has been ruled upon and sustained are district court decisions, and in every one of them the antitrust issue was a counterclaim and not a defense, either because it was not pleaded as a defense or because it was not alleged that the trademark played a part in the antitrust violation, and/or the patent or trademark issues sought only equitable relief or were otherwise triable to the court alone, and not to the jury. (Cases cited in Opp. Br. footnote p. 17.) See, e.g., *Forstmann Woolen Co. v. Murray Sices Corp.*, 10 F. R. D. 367 (S. D. N. Y. 1950), where the court struck the allegations of antitrust violation because they did not assert that the trademark was used for the purpose, but allowed the allegations to stand as counterclaims, and *Forstmann Woolen Co. v. Alexander's Dept. Stores*, 11 F. R. D. 405 (S. D. N. Y. 1951), in which the court held that the antitrust counterclaims and defenses would be a complete defense.

Respondent also cites *Union Carbide Corp. v. Ever-Ready, Inc.*, 392 F. Supp. 280 (N. D. Ill. 1975), reversed 531 F. 2d 366 (7 Cir. 1976), cert. den. 429 U. S. 830 (1976). In that case, the District Court did not rule upon the Rule 42(b) Order since it dismissed the complaint on the grounds that the trademark was not valid and was not infringed. On appeal, the Court of Appeals reversed on these issues. It is significant to note that in remanding the case the Court of Appeals explicitly ruled that defendants must be given an opportunity to establish their antitrust defenses and that the District Court should enter an appropriate injunction *only* if the defendants failed to establish their antitrust defenses. *Id.*, 531 F. 2d at 389.

fully issued without evaluating and ruling upon the antitrust defenses as well as the "trademark" issues and without affording the defendant a reasonable opportunity for discovery and proof of its defenses (an opportunity more or less extensive, depending on the circumstances and upon whether interlocutory or final relief is under consideration); and the order is a clear denial of the right to jury trial which was here demanded on all issues. In these circumstances, it is clearly erroneous to order, as was done here, that "the issues raised by defendant's affirmative defense [including discovery] . . . are stayed until the issues raised by the complaint have been tried and decided" (Pet. App. 100), and it was clearly error to grant a preliminary injunction as to the trademark claims without specifically evaluating and ruling upon the "inextricably intertwined" antitrust defenses.

2. The controlling principles with respect to separation of issues have been stated by this Court both with respect to when separate trials may be ordered and the effect of jury trials: (i) separate trials may be ordered only if the issues are "so distinct and separable from the others that a trial of [one issue] alone may be had without injustice," *Gasoline Products Co. v. Champlin Refining Co.*, 283 U. S. 494, 500 (1931); and (ii) separate trials may not be ordered where the net practical effect is to deny defendant's right to a jury trial. *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959.)

3. It is clear that the Rule 42(b) Order was erroneous: the "trademark" and "antitrust" issues are *not* "distinct and separable;" the trademark issues cannot be heard or decided without hearing and deciding the antitrust defenses. The Rule 42(b) Order cannot be justified as an exercise of the discretionary power of the District Court since it was obviously based on an error of law: that is, the misconception that the antitrust defenses asserted by petitioner would not constitute a defense to the infringement action.

4. It should be emphasized that the Rule 42(b) Order which was entered in the present case does not relate merely to

the order of proof. The trial court ordered that the issues "raised by the complaint," *i.e.*, the issues of validity and infringement of respondent's trademark, were to be "tried and decided" before trial of the antitrust defenses. (Pet. App. 100.) The court asserted that if plaintiff succeeded in establishing the claim of its complaint (*i.e.*, if the trademark were held valid and infringed), this "may obviate the necessity to try the antitrust issues. . . ." (Pet. App. 99.)

Obviously, however, no decision can possibly be made as to the merits of the complaint without a trial and adjudication of defenses which, as we have shown, if proved would necessarily prevent the entry of judgment in favor of the complaint. And we submit that it is equally obvious that it is reversible error for a court totally to deny to defendant a reasonable opportunity of discovery with respect to its well-pleaded antitrust defenses before issuing a preliminary injunction, at least in the absence of a showing of extraordinary urgency which justifies the denial of this right to defendant. It is clear that no such showing could be made here. Plaintiff/respondent did not even apply for injunctive relief until almost thirteen months after it filed its action and the injunction was not issued until more than seven months after the motion was filed.

5. The Rule 42(b) Order in this case denies defendant/petitioner its constitutional right to due process—that is, to a reasonable opportunity to make and prove its defense to the complaint before the issues presented by the complaint are decided either by a final order or a preliminary injunction.

6. Respondent argues that "There is no constitutional mandate that the same jury must try all issues raised by a complaint and by defenses. . . ." (Opp. Br. 20.) This is precisely refuted by this Court's decision in *Beacon Theatres, Inc. v. Westover*, 359 U. S. 500 (1959) (see Pet. 24-26). Clearly, if the antitrust violations are a defense to the trademark infringement claims, the jury considering and deciding the validity and infringement issues must also hear and decide the antitrust evidence.

Respondent relies upon a quotation from 9 Wright & Miller, *Federal Practice and Procedure: Civil*, § 2391, at 302 (1977) to the effect that the constitutional guaranty of the Seventh Amendment is not violated if issues are separately submitted to separate juries. (Opp. Br. 20.) But respondent surprisingly omits any reference to the next following comment of Wright & Miller, which is applicable to the present case:

"There is one limitation that must not be overlooked. In the case stating that a partial new trial may under some circumstances be used, the Supreme Court held that this practice cannot be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice. [Citing, *Gasoline Prods. Co. v. Champlin, supra*.] Similarly separate trial of a particular issue cannot be ordered in the first instance where the issue is so interwoven with the other issues that it cannot be submitted to the jury independently of the others without confusion and uncertainty which would amount to a denial of a fair trial." *Id.* at 303.

In the present case, the relief sought by the complaint includes a prayer for compensatory and punitive damages. (Pet. App. 36-37.) A jury trial was demanded by plaintiff/respondent on all issues. There is no contention that any part of this case may lawfully or constitutionally be tried except by jury. We accordingly submit that the entry of the Rule 42(b) Order was precisely in conflict with this Court's decision in *Beacon Theatres, supra*.

CONCLUSION.

Petitioner respectfully renews its prayer that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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